

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE
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4 Black Rock City LLC, :
5 :
6 Plaintiff, : No. 3:12-CV-435-RCJ-VPC
7 :
8 -vs- : November 25, 2013
9 :
10 PERSHING COUNTY BOARD OF : Reno, Nevada
11 COMMISSIONERS, et al., :
12 :
13 Defendants. :
14 :
15 _____

16 TRANSCRIPT OF STATUS CONFERENCE RE REVIEW OF SETTLEMENT

17 APPEARANCES:

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21
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24 Reno, Nevada

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1 RENO, NEVADA, MONDAY, NOVEMBER 25, 2013, 10:32 A.M.

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4 THE COURT: This is in a court-ordered status
5 hearing on Black Rock City versus Pershing County Board of
6 Commissioners to review a proposed settlement and request for
7 approval.

8 Your appearances, please.

9 MS. HURST: Good morning, your Honor.

10 My name is Annette Hurst from Orrick, Herrington &
11 Sutcliffe on behalf of the plaintiff Black Rock City.

12 MR. BELSKY: Good morning, your Honor.

13 Adam Belsky, Gross, Belsy, Alonso, on behalf of
14 Black Rock City.

15 MR. ELMORE: Judge, Rick Elmore of Holland and
16 Hart, and Tamara Reid, on behalf of the plaintiff.

17 MR. KOLVET: Good morning, your Honor.

18 Your Honor, Brent Kolvet, Thorndal Armstrong, on
19 behalf of the defendants, including Mr. Shirley who has
20 appeared as his own attorney up to now, but he's in Court in
21 Lovelock so I'm authorized to appear and present on his behalf
22 as well.

23 THE COURT: Thank you.

24 Of course, I'm not going to approve this settlement.
25 It's absurd and it's illegal. The contract that you've

1 negotiated is illegal, and I'm going to correct the prior
2 order that I issued and rule, proceed to rule on the dismissal
3 and on the summary judgment.

4 The first error in this case was mine. What I was
5 attempting to do in the dismissal was educate the parties as
6 to how you could proceed to resolve the problem.

7 In great detail, I thought, and with full
8 explanation, I explained to you what you could do with the
9 ordinance in order to make it not invalid under constitutional
10 claims. I thought I did that in great respect.

11 In most cases I dismiss the facial challenges to the
12 ordinance. I think I preserved one. But I also preserved the
13 as-applied challenges to the ordinance, and I gave cautions to
14 the county as to how -- even if the ordinance was not facially
15 challengeable, how the ordinance as applied in a particular
16 case could violate the First Amendment by regulating speech
17 based upon content. In one particular footnote I warned the
18 county about how that could occur.

19 I also made a mistake -- and I intend to correct
20 that prior mistake.

21 I also made a mistake by placing confidence in the
22 good faith of counsel to follow the Court's instructions to
23 correctly interpret the order and reach resolution of the case
24 based upon the Court's instruction.

25 It's obvious to me now that county counsel has made

1 several miscalculations, even committing malpractice, in your
2 advice to the county, number one, in interpreting my order and
3 the effect of the order, that I was giving some kind of
4 imprimatur for an illegal contract between Black Rock and the
5 county, and an illegal settlement.

6 You also committed malpractice in misinterpreting
7 for your client, sir, the effect of the new state statute.
8 You've over-interpreted it broadly, more broadly than is
9 possibly reasonably interpreted or constitutionally that may
10 be interpreted.

11 So in addition to an order, a new decision which
12 I'll issue, I'm also going to commend and require you to
13 commend to your commissioners that they hire replacement
14 counsel because you're not representing their interests.

15 Now, I would expect that from plaintiff's counsel.
16 They're pushing the envelope as far as they can in seeking an
17 agreement which does what no one can do, constitutionally can
18 do.

19 You can't walk across the state line and enter into
20 an agreement with a county that they won't enforce state,
21 federal, or local law. You can't do that.

22 You can do what the state legislature told you you
23 can do. You can enter into an agreement that waives the
24 normal requirements for permits and binds the county to a
25 payment schedule for services, like police services, like

1 other services, but you can't include in that agreement any
2 kind of a prohibition on the county for enforcing what they're
3 obligated to enforce.

4 For example, this agreement that you've presented to
5 me implies that they cannot pass further ordinance, nor
6 further interfere, with the bringing of children to this
7 event. That's one of the clauses in this agreement.

8 The record will reflect I'm laughing on the record.

9 Do you mean to purport by that agreement that you're
10 telling the county they can't enforce child abuse statutes,
11 delinquency statutes?

12 We all know that it's a violation of the First
13 Amendment for the county to regulate based upon content. So,
14 for example, if the county is saying that you can't have a
15 public display of nudity, that's prohibited by the
16 constitution. We know that.

17 But can the county -- in fact, can the county --
18 number two, is the county obligated to enforce limitations on
19 minors being present at such events? Absolutely the county
20 can, and you can't abrogate their duty and obligation under
21 the law of Nevada or under the law of the Constitution of the
22 United States in prohibiting them from doing that.

23 Your contract here is illegal. It insults the
24 intelligence of the court, and it insults my intelligence, and
25 insults the intelligence of the commissioners who obviously

1 have been prevailed upon by plaintiff's counsel and defense
2 counsel to abrogate their duties.

3 So because you made me sit and read through all
4 these pleadings and this ridiculous agreement -- and you can
5 tell that I'm upset, and, for the record, I am upset because
6 you've waltzed across the state line and asked -- you've
7 committed virtually a fraud on the federal court. You've
8 certainly committed a fraud on the county commissioners in
9 combination with counsel for the commissioners, and you've
10 committed a fraud on the State of Nevada. So that's the
11 reason I'm upset.

12 I'm going to make you -- just as you made me sit and
13 read, you're going to sit here for the next hour while I tell
14 you what's illegal about the settlement agreement, and I'm
15 going to give you the correct interpretation of the Court's
16 prior order which has obviously been misrepresented to the
17 county commissioners.

18 With that preface -- please be seated. Just take
19 careful notes.

20 I'll turn first to the Court's order which partially
21 dismissed and partially denied dismissal of the complaint.
22 This order was filed of record on February 4th of -- I'm
23 sorry, April 26, 2013, is document number 60. It's the order
24 in response to the motion of the county and various parties
25 for dismissal.

1 You'll note that one thing the order did was it
2 dismissed the county commission but gave you leave to amend to
3 plead against the county instead. Was that amendment filed?

4 MS. HURST: Yes, your Honor.

5 Your Honor, may I be heard briefly?

6 THE COURT: No.

7 MS. HURST: Your Honor --

8 THE COURT: Was the amendment filed?

9 MS. HURST: It was, your Honor.

10 THE COURT: Okay. So you named correctly the
11 county.

12 As we all know, of course, even under sovereign
13 immunity, even as a subdivision of the State of Nevada
14 authorized by Nevada statute, I think probably sovereign
15 immunity applies. I'm sure that may be an issue for dispute.

16 So I don't think you can make claim against the
17 county, or against the individual commissioners, for damages.
18 You may be able to if there's sufficient proof, but I think
19 you'll have a problem both under sovereign immunity and also
20 under damages proof.

21 But that's not the real relief that you were
22 requesting anyway. The real relief you were requesting was
23 declaratory relief, and there, of course, you can name
24 individual county commissioners for violation of your First
25 Amendment rights, and, of course, if it's only declaratory

1 relief prospectively going forward, you can potentially get
2 that relief against the county as well.

3 So that's the real relief you were requesting, and
4 apparently you followed that admonition by amending your
5 complaint to name the county as opposed to the commissioners
6 for that declaratory relief.

7 Now, the order -- you've reviewed it and seen it,
8 I'm sure. The first point that I wanted to point out to you
9 is on page 7 of 18. That paragraph begins,

10 "Plaintiff therefore filed for a permit from
11 the county under duress. As noted below, the parties
12 did not enter into" -- please be seated -- "into any
13 law enforcement agreement in 2012; rather, the law
14 enforcement expenses were made part of the license
15 fee that the county charged to plaintiff.

16 "Plaintiff believes that the county will
17 impose obligations and requirements onto plaintiff
18 inconsistent with the BLM permit for the 2013 event.
19 Specifically, Condition 7 of the County Festival
20 License requires plaintiff" to do two things, "to
21 comply with Nevada Revised Statutes section
22 244.3548(3)-(7), which prohibits assemblies from
23 constituting a public or private nuisance; exhibiting
24 obscene, indecent, vulgar, or lewd exhibitions;
25 permitting disorderly conduct; allowing illegal

1 possession of liquor; and permitting illegal
2 possession of controlled substances.

3 "The County Festival License also imposes a
4 \$448,000 fee and a requirement that plaintiff provide
5 a trailer park," et cetera. "The Festival Ordinance,
6 as amended, would potentially impose even higher
7 fees."

8 So the two points I want to make here is there were
9 two requirements by this permit with BLM.

10 Now, BLM could and probably should, instead of
11 imposing on Pershing County, assume the obligation to enforce
12 and police the agreement themselves. We have a record of an
13 out-of-control BLM in this state and district, so I
14 understand.

15 And probably consistent with practices throughout
16 the United States, this BLM permit required the permittee,
17 licensee, to get a contract with the local sheriff's
18 department to enforce local, state, federal law, to have the
19 authority to arrest, to pursue all police powers on behalf of
20 BLM, and it required direct payment.

21 The other thing the permit required was for the
22 permittee, the licensee, to comply and obey all federal,
23 state, and local laws.

24 There's no way -- and we'll talk about the
25 interpretation of the state statute which requires -- before

1 the county enters into an agreement that exempts a particular
2 licensee or event, requires the county to assure itself that
3 the concerns of the statute imposed upon all counties, without
4 selectivity, that the concerns of that statute are met, which
5 clearly the county did not do in this alleged settlement
6 agreement. In fact, it abrogates those duties.

7 This permit mandated that they comply with all
8 federal, state, and local law. So for you to attempt to
9 settle this, and seeking cover with your voters on the basis
10 that this is a federal court ordered settlement or approved
11 settlement is absurd.

12 You're not going to approve it over my signature,
13 that's for sure, nor did I motivate it.

14 The next problem with your interpretation of my
15 order will proceed. On page 9, I discussed preemption, and I
16 determined that there was no preemption.

17 Congress, in providing -- and/or the regulatory
18 process, in providing for granting of permits for such events,
19 there's clearly no attempt to preempt the entire field, and,
20 accordingly, as I remind you, the Field Preemption Doctrine
21 did not apply.

22 On page 10, we start at the paragraph,

23 "Congress has not occupied the field of
24 outdoor assembly regulation. It has, however, via
25 the BLM, granted a specific permit for plaintiff's

1 use of federal land. To any extent the county's laws
2 actually conflict with the BLM permit, or impede
3 Congress's purposes, they are," of course,
4 "preempted. The laws at issues here do not actually
5 conflict with the BLM permit or impede Congress's
6 purposes. The BLM has specifically required
7 plaintiff to coordinate with local authorities for
8 law enforcement services under the BLM permit."

9 So I gave you a ruling. You could have appealed it,
10 of course, or you could have asked for certification of the
11 question to the Ninth Circuit, but I gave you a clear ruling
12 that there was no field preemption, and there was no specific
13 preemption based upon conflict between the permit and the
14 local law. That's the ruling that pertains and describes this
15 case.

16 "The 2011 BLM permit essentially made the
17 cooperation of local authorities a condition for use
18 of the federal land. If the BLM were to have
19 permitted plaintiff to conduct the event on federal
20 land within Pershing County with or without any law
21 enforcement services, either in explicit terms or by
22 silence, and if the county were then to have required
23 plaintiff to pay for law enforcement services on
24 federal land, there might be an actual conflict
25 implicating the Supremacy Clause. But here the

1 requirement to obtain local law enforcement services
2 was an express condition of the BLM permit."

3 So in case you have an inability to read the order,
4 I'm reading it to you again as any law student graduate would
5 be able to do.

6 "Furthermore, the BLM specifically required
7 plaintiff to comply with state and local laws. The
8 2011 BLM permit applicable to the 2011 event is
9 attached to the complaint as Exhibit A. Condition 6
10 of the permit states, 'Permittee must observe all
11 federal, state, and local laws and regulations
12 applicable to the premises....' Therefore, even
13 without a separate requirement to coordinate with
14 local law enforcement, the 2011 BLM permit makes the
15 observance of the Festival Ordinance an explicit
16 condition of the use of the federal land."

17 And remember, the Festival Ordinance is mandated on
18 all counties by the state legislature. They mandated that you
19 pass such an ordinance.

20 Next paragraph,

21 "The 2011 BLM permit attached to the
22 complaint as Exhibit O is also conditioned upon
23 compliance with federal, state, and local laws,
24 regulations, and ordinances."

25 Enough of that point.

1 Just reading to the conclusion there, because I
2 think it's interesting that somehow you skipped it in reading
3 the order in seeking advice from the Court on how you might
4 resolve or settle this dispute,

5 "To the extent those local laws are more
6 restrictive, as plaintiff alleges, the BLM permits
7 require their observance. The fact that the BLM
8 permits may be more permissive in some ways simply
9 means that the BLM is satisfied so long as the less
10 restrictive conditions it has imposed are complied
11 with. But the BLM has specifically required the
12 observance of local laws, as well. So long as it is
13 possible to comply with the BLM permit and the local
14 laws at the same time, there is no actual conflict
15 under the Supremacy Clause."

16 Now, for you, in your settlement agreement, to
17 purport to prohibit the county from enforcing local
18 delinquency laws, or state laws, let alone federal, Mann Act
19 laws, or child protection laws, is an absurd conclusion. The
20 permit itself required compliance with those laws.

21 For the state to abrogate that duty, oh, we won't
22 enforce it because we've agreed with them, for 50 years -- the
23 record will reflect again that I'm laughing -- it's an absurd
24 result, and it's really malpractice.

25 On the First and Fourteenth Amendment claims,

1 "In the third and fourth causes of action
2 respectively, plaintiff alleges that the Festival
3 Ordinance violates the First Amendment on its face
4 and as applied. Plaintiff alleges that defendants
5 amended the Festival Ordinance with the improper
6 purpose of abridging protected speech and expressive
7 conduct at the event. The Court dismisses the third
8 cause of action in part but will not dismiss the
9 fourth."

10 Now, in case you missed it, which I think you did,
11 the Court will detail the facial and as-applied challenges and
12 the rulings that I gave, again, subject to appeal. Anybody
13 could have asked me to certify the question, and we could have
14 had an appeal to the Ninth Circuit.

15 "A law is facially invalid under the First
16 Amendment if there are no set of circumstances under
17 which it could be valid, or if a substantial number
18 of the law's applications would be invalid judged in
19 relation to its plainly valid applications. For the
20 most part, the Court cannot find the Festival
21 Ordinance to be unconstitutional on its face. On its
22 face, the ordinance is mostly content neutral except
23 for certain regulations related to speech that is not
24 fully protected by the First Amendment, for example,
25 obscenity."

1 The regulation, without being violative on its face,
2 can regulate obscenity. It can regulate public display of
3 nudity.

4 Now, you can't regulate, based upon content, of
5 which nudity can be expressive, as we all know, and partially
6 protected by the First Amendment. You can't regulate all
7 forms in all places public nudity. You can't do that. But
8 you sure as heck can regulate exposure of children. In fact,
9 you're only obligated to regulate exposure of children to such
10 public nudity.

11 Why do you think the Supreme Court and the Ninth
12 Circuit have upheld restrictions and limitations on
13 prohibiting minors from visiting X sex shops? It's because
14 they're valid. They're not an invalid prohibition under the
15 First Amendment.

16 Why do you think the U.S. Supreme Court, as well as
17 the Ninth Circuit, have allowed prohibition of minors to be
18 involved with gambling machines or standing next to them?

19 Why do you think the Nevada legislature has been
20 allowed to prohibit the sale of alcohol or tobacco to minors?
21 Because, even if expressive, those types of regulations are
22 permissible under the First Amendment. I hope you get that.
23 That's a clear message that the order was intending to convey
24 to you.

25 "On its face, the ordinance is mostly content

1 neutral except for certain regulations related to
2 speech that is not fully protected by the First
3 Amendment, that is, obscenity."

4 Citing the Pershing County Code 5.15.140(e),
5 "Providing for the revocation of a license in
6 the event any license applicant, or his agent, has
7 been convicted for obscenity, lewd conduct, violent
8 crimes, crimes against children or other felony
9 offenses.

10 "This particular section of the Festival
11 Ordinance does not impose the content-based
12 restrictions directly, but rather requires separate
13 conviction for crimes in a court where constitutional
14 protections will presumably apply."

15 Now, another misinterpretation of the state statute
16 that counsel is guilty of is that you figured gave you license
17 to agree that you could not constitutionally prohibit the
18 imposition of obscenity upon minors. Not only was that
19 interpretation incorrect, it's just flat wrong.

20 Going on, on page 12,

21 "The Festival Ordinance specifically
22 prohibits the county from revoking a license based
23 upon speech that is protected by the federal or state
24 constitutions."

25 Now, I've tried to make that clear to you. I guess

1 I didn't make it clear enough in the order. You can't
2 restrict expressive speech, including nudity. You can
3 undoubtedly restrict expressive speech to the extent it
4 includes sexual acts.

5 You know, county ordinances -- for example, in
6 Washoe County we do permit an X-rated movie house. That's
7 expressive speech. You can't restrict that. But you sure as
8 heck can restrict that store from presenting sexually-explicit
9 conduct. You can prohibit a show of nude dancers performing
10 sex acts on patrons. The county code does that, and I assume
11 counsel for the county is aware of that ability, and, in fact,
12 the agreement of the county not to enforce such ordinances
13 would be a mistake.

14 And the major mistake you made in interpreting the
15 state statute, where the state statute mandates that the
16 county satisfies itself before granting an exemption that the
17 federal permit covers all of the concerns raised by the
18 mandatory ordinance. That's one area that you expressly did
19 not cover. There's certainly no finding on this record.
20 There's no finding even suggested that you even considered
21 that concern.

22 The BLM was passing this burden and baton to you.
23 You accepted it. So for you to say now we can abrogate that
24 duty, even though it's not in the permit, even though Congress
25 has not preempted the field, is an abrogation of your duty and

1 a misinterpretation of both the federal statute and of my
2 order.

3 So,

4 "The Festival Ordinance specifically
5 prohibits the county from revoking a license upon
6 speech that is protected by the federal or state
7 constitutions. First Amendment protections are
8 therefore built into the ordinance in theory. It is
9 possible, however...."

10 In other words, a person has to be convicted.
11 There's nothing in the BLM permit that requires any review of
12 the history or applicants or owners of Black Rock. So what if
13 you have somebody in the application process, which is a
14 consideration written right into the state statute, that's
15 guilty of five times transporting drugs across the state line
16 relative to the Black Rock event, or a person in one of the
17 venues who wants to run a pedophile venue and has been
18 convicted under the Mann Act or convicted under the new State
19 of Nevada state statute.

20 You know, the same legislation that passed this
21 amendment to the statute giving the right to exempt also
22 passed, whether you're aware of it or not, a new statute that
23 ups the criminal penalties for trafficking in children.

24 Were you aware of that, sir?

25 You don't need to respond.

1 So for you to interpret the state statute as
2 allowing you to exempt out that concern is absurd. You cannot
3 interpret the new Nevada statute inconsistent with the other
4 legislation that's directly on point.

5 So obviously you did not consider what the state --
6 new state statute mandates that you consider in granting any
7 exemption, and that's whether all of those concerns raised in
8 the mandatory state statute, county statute, are met in the
9 BLM permit on federal land or on land licensed by a federal
10 entity.

11 Most important and instructive is the last paragraph
12 on page 12.

13 "First and second, the section prohibits
14 applicants from conducting an event or selling
15 tickets to an event without a license. These
16 provisions concern pure conduct and do not implicate
17 the First Amendment."

18 Somehow you skipped over that in your reading to the
19 county commission.

20 "Third, an applicant may not carry out an
21 event 'in a manner to create a public or private
22 nuisance.' "

23 Now, "The definition of the Festival
24 Ordinance does not separately define 'nuisance,' so
25 the word presumably retains its common law meaning.

1 The prohibition of common law nuisance does not
2 violate the First Amendment on its face."

3 I don't know how I could have been any clearer
4 unless I had put it in bold print.

5 "The prohibition of common law nuisance does
6 not violate the First Amendment on its face.

7 Although it is possible that a particular attempt to
8 revoke a license based upon a 'nuisance,' that is, a
9 nuisance not because of any interference with the
10 enjoyment of the use of another's land, but only
11 because of the content of expressive speech or
12 conduct, may result in an as-applied First Amendment
13 violation. The prohibition of nuisances," generally,
14 "does not violate the First Amendment on its face."

15 That's where I gave the footnote with the warning.
16 Obviously you misinterpreted the warning. The warning was to
17 give you instruction on where you might violate the First
18 Amendment by as-applied application of a nuisance prohibition.

19 That footnote warned:

20 "Defendants are warned, however, that it may
21 be difficult for them to show any 'nuisance' based
22 upon the speech or expressive conduct of event
23 participants if no participants complain to the
24 authorities and the nuisance occurs in the Black Rock
25 Desert far from the perception of any adjacent

1 private landowners or other public areas."

2 That was just simply a clear warning to you,
3 hopefully, on my confidence in the good faith of counsel that
4 you're aware of the rules, that you could not defeat an
5 as-applied challenge by simply declaring the public nudity to
6 be a nuisance. You couldn't do that. That would be an
7 as-applied challenge and a violation. But if you enforced a
8 requirement that that public display be limited in scope to
9 adults, in other words consenting adults, then there's no
10 as-applied challenge.

11 I hope you get the distinction, and hopefully you
12 will order this transcript and review it one more time so you
13 get the distinction when you're advising the county. There's
14 only an as-applied challenge when you are restricting or
15 limiting protected speech. Okay?

16 Expressive speech in front of a minor, including
17 lewd conduct, is not protected speech, and I'm looking at
18 plaintiff's counsel now, and you know that, and you knew it
19 when you walked in the courthouse door, and your attempt to
20 invoke it over this Court's approval is offensive.

21 "Fourth, applicants may not exhibit, show, or
22 conduct any 'obscene, indecent, vulgar or lewd
23 exhibition, show, play, entertainment or exhibit...."
24 The Court will not dismiss the facial challenge to
25 this subsection of the Festival Ordinance."

1 This is the one exception, and I intend to change
2 this in a revised order because I think I've got this wrong in
3 light of the way you've interpreted it.

4 "Although 'obscenity' is not constitutionally
5 protected, indecent speech is protected, *Sable*
6 *Communications of California versus FCC*," again, that
7 was given to you as hopefully instructive, "as is,
8 presumably, speech that is 'vulgar' or 'lewd.'
9 Indecent sexual speech may be prohibited only in ways
10 narrowly drawn to serve the purpose of preventing
11 children from exposure to such material. The
12 subsection of the Festival Ordinance at issue here is
13 not drawn to this purpose at all, it's broader than
14 that, but applies broadly to any 'indecent, vulgar or
15 lewd exhibition, show, play, entertainment, or
16 exhibit.' The Court will not dismiss the facial
17 challenge to this law."

18 Now, I wasn't saying there was a facial challenge,
19 it's valid. What I was saying was I need evidence to tell me
20 whether it's being applied in a way that's more numerous, or
21 more likely numerous, that is more frequently -- if violative
22 more frequently than innocuous, perfectly innocent
23 applications of the ordinance.

24 You can restrict in a publicly permitted event
25 indecent, vulgar, or lewd exhibition, show, play,

1 entertainment or exhibit if you tie it to the ultimate purpose
2 for doing so, and so that it won't be displayed to children.
3 I thought the order was pretty clear on that, but somehow you
4 missed that.

5 Now, fifth cause of action.

6 "Applicants may not 'allow any person on the
7 premises'" -- or the fifth requirement under the
8 ordinance. "Applicants may not 'allow any person on
9 the premises of the licensed festival, assembly, or
10 event to cause or create a disturbance by offensive
11 or disorderly conduct.' The Court will not dismiss
12 the facial challenge to this provision. Lest they
13 prohibit substantial protected speech" --
14 that, of course, we would know by further evidence, or further
15 evidence of those who testify as to how it was to be applied
16 and how it was intended to be applied --

17 "-- 'disorderly conduct' laws must generally
18 be insulated by an internal requirement that the
19 conduct threatens an immediate breach of the peace, a
20 requirement notably absent from the present
21 provision."

22 I was giving you a clue as to how to modify the
23 local ordinance to make it nonviolative. That is what I was
24 calling for. That's what I was suggesting to you, here's the
25 ways in which it can be violative on a facial challenge. I

1 was trying to give you a clue as to how to modify the
2 ordinance which abrogates the lawsuit.

3 If you willingly comply and change the ordinance,
4 that's all you have to do. You don't have to give up your
5 duty to enforce minor delinquency laws. You don't have to
6 give up your duty to enforce basically the Mann Act, or the
7 equivalent state statutes on the Mann Act, importing persons
8 for purposes of prostitution, or minors for purposes of sexual
9 activity, both federally and state prohibitive. You don't
10 have the right, let alone the obligation under my order, to
11 abrogate those duties.

12 The Court will not dismiss that facial challenge,
13 and I gave a clue as to how to correct the statute.

14 "'The Supreme Court has consistently held
15 that the First Amendment protects verbal criticism,
16 challenges, and profanity...unless the speech is
17 shown likely to produce a clear and present danger of
18 a serious substantive evil that arises far above
19 public inconvenience, annoyance, or unrest.'"

20 Citing the Supreme Court case, giving you the direct
21 authority and place to turn to to see what the ordinance
22 should contain in order to limit it.

23 "Furthermore, the provision here also
24 prohibits a disturbance by 'offensive' conduct. The
25 Court cannot say that a facial challenge to such a

1 law is not viable. A significant amount of protected
2 speech may be prohibited by this provision in
3 relation to unprotected speech.

4 "Sixth, alcohol consumption, possession, and
5 sale must comply with state law. This provision
6 concerns pure conduct and does not implicate the
7 First Amendment.

8 Seventh, the seventh requirement, that last one was
9 alcohol consumption.

10 "Seventh, the use, sale, and possession of
11 narcotics and dangerous drugs is prohibited. This
12 provision concerns pure conduct and does not
13 implicate the First Amendment."

14 So why in the settlement agreement do you give them
15 basically virtually a veto authority on what the sheriff is
16 doing? You -- nothing wrong with requiring the two parties to
17 consult together so many weeks or months before the event and
18 come up with a common statement to the public, here's going to
19 be the priorities in enforcement so that the public is clearly
20 warned we are going to enforce federal, state, and local drug
21 and alcohol laws, we are going to enforce child abuse
22 statutes, pedophile statutes.

23 MR. KOLVET: Your Honor, may I inquire as to
24 where -- in what agreement you think we did that?

25 THE COURT: We're getting to that after I review

1 my order so that you can correctly interpret it --

2 MR. KOLVET: Okay. Because --

3 THE COURT: We're going to turn to the agreement
4 line by line, and I'm going to show you where it's an illegal
5 agreement.

6 MR. KOLVET: Because, as -- my reading of the
7 agreement is that we didn't give up any right to enforce any
8 law in the state or federal system.

9 THE COURT: Yeah, well, we're going to see that
10 when we read it line by line.

11 MS. HURST: Your Honor, we concur with
12 Mr. Kolvet's interpretation of the --

13 THE COURT: I'm sure you do, ma'am --

14 MS. HURST: Your Honor, the manner --

15 THE COURT: -- but your interpretation is
16 incorrect.

17 MS. HURST: Your Honor, the matter is before the
18 Court on a motion to dismiss, not a motion to approve the
19 settlement. If the -- the question was to motion to dismiss
20 the claim with prejudice and retain jurisdiction. If the
21 Court wishes not to retain jurisdiction, then the stipulation
22 for dismissal has been filed and is effective pursuant to Rule
23 41(a)(1)(A)(2).

24 THE COURT: Thank you, ma'am, for your citation.
25 Address it to the appellate court, please.

1 I'm going to finish concluding with my citation
2 here, and just like you made me sit here and read the approval
3 and the proposed settlement, I'm going to tell you where it's
4 illegal and where you have misinterpreted the Court's prior
5 order and why I'm going to revise it. So please be seated and
6 continue to listen.

7 "In the fourth cause of action, plaintiff
8 brings an as-applied First Amendment challenge
9 arguing" -- this is as applied, not facially, as
10 applied," -- arguing that the fees to be charged in
11 the Festival Ordinance were instituted for the
12 purpose of suppressing protected speech. The Court
13 will not dismiss this claim. As can be seen from the
14 allegations recounted in Part 1, plaintiffs have
15 sufficiently alleged that defendants repudiated valid
16 contracts and instituted the Festival Ordinance in
17 their place with the invalid purpose of suppressing
18 speech that they found objectionable."

19 Now, you apparently misread this order. You took my
20 statement that I can't dismiss yet the as-applied challenge to
21 mean that I was approving the facial and as-applied challenge,
22 and that's just not correct because it's very likely the case
23 that their allegations in the complaint are incorrect. I
24 simply was not addressing that.

25 They allege, and sufficiently alleged to defeat a

1 motion for dismissal, probably not summary judgment, that the
2 county's purpose, or primary purpose, was to outlaw protected
3 speech. I hope you realize that they have a burden of proof
4 on that issue.

5 MR. KOLVET: I do, your Honor.

6 THE COURT: I hope so.

7 "'Content-based regulations are presumptively
8 invalid.'" Content-based. "We ordinarily review
9 content-based restrictions on protected expression
10 under strict scrutiny, and thus, to survive, the act
11 'must be narrowly tailored to promote a compelling
12 government interest.'"

13 Again, and I think I already told you, went over at
14 length, as to how you could change the ordinance to tie it
15 directly to the protected interest, the critical interest of
16 the state.

17 "'A law is content-based if either the main
18 purpose in enacting it was to suppress or exalt
19 speech of a certain content, or it differentiates
20 based on the content of speech on its face.'

21 Plaintiff has sufficiently alleged a First Amendment
22 violation under Rule 8(a). Plaintiff has alleged a
23 content-based purpose."

24 But that's all they did. They alleged it. The
25 Court was not confirming that they had proven it. In fact,

1 the Court looks always with scepticism at allegations, pure
2 allegations, in the complaint.

3 If the allegations are sufficient, I have to let the
4 complaint proceed, not past summary judgment because they
5 still have the burden. And it's clear to me that based upon
6 your proposed settlement here that you misread what the Court
7 was instructing you to do. The strict scrutiny required would
8 not permit the Court to dismiss the claim at this stage if I
9 were to agree with their allegations.

10 Now, the fifth cause of action addressed due process
11 rights which they claimed "were violated when the petition was
12 collusively litigated by Defendant Shirley against the other
13 defendants."

14 Basically I struck this cause of action because
15 without plaintiff as a party, and before a judge who should
16 have recused himself -- this isn't my statement, this is
17 simply repeating their allegation in the statement, somehow
18 you took that to read something else -- under the Due Process
19 Clause of the Fourteenth Amendment and Nevada law for bias.

20 Let me read the Court's instruction to you on this
21 one.

22 "The Court dismisses this claim. Although
23 defendants make allegations that, if true, indicate
24 serious judicial misconduct" --
25 and, please, don't read it that I'm saying it was judicial

1 misconduct. I further conclude down below that's not for me
2 to decide. I cited for you, and somehow you missed it, the
3 Rooker-Feldman Doctrine citation. That duality of U.S.
4 Supreme Court cases reflects the very well-established
5 doctrine that federal courts don't act as appellate courts for
6 state courts or state previously-determined issues.

7 Somehow -- I understand it's very brief, but it's
8 right there in bold print, it's cited, the Rooker-Feldman
9 Doctrine. Somehow you missed the issue that I was not going
10 to take review of the state court proceeding.

11 "The Court dismisses this claim. Although
12 defendants make allegations that, if true, would
13 indicate serious judicial misconduct in several
14 respects, those issues are not properly before this
15 Court. As to recusal," number one, "under state
16 statute or rule (or relief from judgment), plaintiff
17 must petition the state court and/or the Nevada
18 Supreme Court."

19 You didn't read this when you agreed in the
20 agreement, the settlement agreement, that any review of the
21 permit or anything under the agreement could not be heard by
22 Judge Wagner?

23 I assume Judge Wagner was at the time, is now, I
24 don't know, was or is a properly-elected judge, and you wrote
25 it into your agreement that venue is proper in the State of

1 Nevada, and even in the state district court for certain
2 things, then you will continue in the federal district court
3 over the agreement itself. But then you wrote into it in the
4 decree a properly-elected state judge will not hear the
5 proceeding. That's nonsense.

6 MR. KOLVET: Your Honor, the way --

7 THE COURT: You can't do that under Nevada law
8 without a petition to the state court mandating that he give
9 up his duties upon an appropriate -- you're violating his due
10 process rights.

11 MR. KOLVET: May I explain?

12 What is intended by the agreement was that under
13 Nevada law each party in the lawsuit has one right, one
14 chance, to preempt a judge by paying \$450 to the State Bar --
15 or to the court system. That's what's meant by that.

16 If they chose not to have Mr. Wagner preside, they
17 could pay their \$450. We're not automatically precluding him
18 from doing anything. So --

19 THE COURT: Tell me something, counsel.

20 MR. KOLVET: Sure.

21 THE COURT: Is it your understanding that in
22 trying to set aside a previously-issued writ or petition or
23 judgment that Judge Wagner is accused of doing, that in a
24 motion to set it aside because the judge should have recused,
25 that they could simply pay the fee and get that matter heard,

1 previously assigned to Judge Wagner, by another judge? Are
2 you suggesting that to me?

3 MR. KOLVET: No, your Honor.

4 THE COURT: I hope not because you would be
5 insulting my intelligence, sir.

6 MR. KOLVET: What I was referring to --

7 THE COURT: You can't delete Judge Wagner, a
8 duly-elected judge, from hearing the matter by stipulation
9 agreement without, as required by Nevada law, a petition to a
10 Nevada Court -- doesn't have to be Judge Wagner, a petition to
11 a court to displace Judge Wagner out of his duties either
12 generally or at least as to a particular case --

13 MR. KOLVET: Your Honor, that --

14 THE COURT: -- which procedure gives Judge
15 Wagner due process rights.

16 Your agreement is invalid and illegal because it
17 violates Nevada law.

18 MR. KOLVET: Your Honor, we had no intent,
19 there's nothing in the agreement that affects the previous
20 writ issued by Judge Wagner. There's nothing that I am aware
21 of that challenges the previous writ.

22 Mr. Shirley, who is one of the defendants in this
23 case, actually presented that writ to Judge Wagner, sought it,
24 got an order related to that.

25 This proceeding in front of you has nothing to do

1 with that, nor does the agreement attempt to affect in any
2 way --

3 THE COURT: Then why does the agreement, based
4 upon my order and allegedly with excuse to the county voters
5 that a federal judge ordered it, why does the agreement
6 provide, number one, that Judge Wagner won't hear any case
7 that's brought there on the proceeding, and, number two and
8 more important, why does it release all parties, both sides,
9 but not Judge Wagner?

10 MR. KOLVET: Your Honor, Judge Wagner, as you're
11 well aware, was not a party to these proceedings.

12 THE COURT: He sure wasn't. And do you know
13 why?

14 MR. KOLVET: I didn't bring the lawsuit, your
15 Honor.

16 THE COURT: You don't know why?

17 MR. KOLVET: I have strong opinions as to why he
18 wasn't.

19 THE COURT: I know why.

20 MR. KOLVET: There's an absolute immunity
21 for judges acting in the --

22 THE COURT: That's right. You got it. There's
23 an absolute immunity for anything he did on the bench.

24 MR. KOLVET: That's correct.

25 THE COURT: And there's a qualified privilege

1 for citizens who appear before the commission.

2 MR. KOLVET: There are, your Honor.

3 THE COURT: So he had immunity and privilege for
4 his statements to the community and for his actions on the
5 bench.

6 MR. KOLVET: I don't --

7 THE COURT: That's why they didn't bring it,
8 sir.

9 MR. KOLVET: I don't disagree with you, your
10 Honor, in any sense.

11 THE COURT: So why do you carve out and not
12 release Judge Wagner? If they had a right to file a cause of
13 action, don't you think they would be barred at this juncture
14 for not joining Judge Wagner?

15 If they were to bring that lawsuit now anew in
16 federal court because you didn't release Judge Wagner, don't
17 you think the federal court or the state court would say,
18 sorry, you waived that claim, you should have joined it at the
19 same time you sued the county? Don't you think that they
20 would have waived that claim?

21 MR. KOLVET: I would.

22 THE COURT: Why did you carve out Judge Wagner?

23 MR. KOLVET: What the language of the agreement
24 talks about is it does not release him to the extent -- or to
25 Judge Wagner shall not be construed to bar any ethics or

1 disciplinary complaint or other proceedings that BRC may bring
2 against him.

3 THE COURT: Or other proceedings.

4 MR. KOLVET: Okay. But the other proceedings --

5 THE COURT: A lawsuit for a liability for
6 suppressing or conspiring to suppress their speech?

7 MR. KOLVET: I don't believe they have a claim
8 for that.

9 THE COURT: I don't either, but certainly the
10 language in this agreement as you crafted it and approved it,
11 or agreed to the crafting of it, it suggests that. They
12 reserve the right, presumably with explanation to the voters a
13 federal judge ordered us.

14 MR. KOLVET: I, again, am somewhat confused by
15 your interpretation of this agreement to this point.

16 THE COURT: Why are you confused now? We've
17 spent the last ten minutes on this provision. Why did you
18 carve them out?

19 MR. KOLVET: Why did I carve them out?

20 THE COURT: I told you, and I agreed with you,
21 that there was no cause of action. That's why they didn't
22 file it.

23 MR. KOLVET: Right. And so there's --

24 THE COURT: And so why did you carve out further
25 proceedings, including state or federal lawsuits as well as

1 ethics complaints, out of the release provisions?

2 MR. KOLVET: I didn't carve it out. That was a
3 request of the plaintiffs to carve it out, and because --

4 THE COURT: There you go. And why did you
5 recommend to your commission that they agree to it?

6 MR. KOLVET: A, Judge Wagner was not a party.

7 B, I don't think that I could preclude them from
8 pursuing ethical complaints to anybody about any action they
9 felt was inappropriate.

10 THE COURT: Of course not. But don't you think
11 you could preclude them from filing a separate lawsuit or
12 amending at this late date to add Judge Wagner?

13 MR. KOLVET: Well, the dismissal would get rid
14 of it out of this case.

15 THE COURT: And wouldn't you have the obligation
16 to defend him?

17 MR. KOLVET: No.

18 THE COURT: You wouldn't.

19 MR. KOLVET: No.

20 THE COURT: You're outside counsel.

21 MR. KOLVET: No.

22 THE COURT: You're just retained for this event.

23 MR. KOLVET: No. The Attorney General's Office
24 represents district court judges. They're state officers,
25 they are not part of the county.

1 THE COURT: Oh, okay. So the state Attorney
2 General has that obligation. You'll leave that up to them.

3 MR. KOLVET: Which generally works it out,
4 Judge.

5 THE COURT: And therefore no release for Judge
6 Wagner on further lawsuits.

7 MR. KOLVET: Your Honor, as you've already
8 pointed out, the limitations of other things restrict the
9 ability of the plaintiffs to bring any lawsuits against the --

10 THE COURT: Now, you're private counsel, right?

11 MR. KOLVET: I am, your Honor.

12 THE COURT: You're retained for this lawsuit?

13 MR. KOLVET: Yes, your Honor.

14 THE COURT: What's the basis of your retention,
15 sir?

16 MR. KOLVET: I'm sorry?

17 THE COURT: What's the basis of your retention,
18 hourly?

19 MR. KOLVET: Yes, your Honor.

20 THE COURT: And, of course, it's on
21 representation that you're licensed and you won't commit
22 malpractice, right?

23 MR. KOLVET: No. It's on the representation I'm
24 licensed. Malpractice is in the eye of the beholder I would
25 suspect.

1 THE COURT: That's right, a jury and a judge,
2 and you're getting it from a judge right now.

3 MR. KOLVET: I am representing them to the best
4 of my ability, and so far what I've heard you say I've done in
5 this case has never been done by me.

6 What you said is I didn't interpret your rules
7 right, or your ruling right.

8 THE COURT: Correct.

9 MR. KOLVET: That's incorrect. We were
10 intending to file motions for summary judgment on all those
11 points that you've raised.

12 THE COURT: Yeah.

13 MR. KOLVET: What then occurred is that the
14 legislature got in the middle of this thing. They were, at
15 the start of the process, going to take away any power that
16 the county had to enforce anything against Burning Man or any
17 other similar thing --

18 THE COURT: The record will reflect the judge is
19 laughing.

20 You've misinterpreted that statute. We're going to
21 get into that in detail in a moment. The language of the
22 statute is "may."

23 MR. KOLVET: The current statute is.

24 THE COURT: And we both know that the
25 legislature, if they had such an intent, could not have

1 carried through with an intent to order Pershing County to
2 exempt this one event. They don't have the authority to do
3 that.

4 MR. KOLVET: I don't disagree with that.

5 THE COURT: The legislature, by constitution and
6 state statute, can only legislate as to counties on an equal
7 basis effective as to all counties.

8 MR. KOLVET: I am well aware of the
9 constitution.

10 THE COURT: There's no way in the world that the
11 state legislature, assuming that they expressed such a hidden
12 intent to you, I doubt your statement --

13 MR. KOLVET: I've got to tell you, your Honor, I
14 wasn't involved in that.

15 THE COURT: -- to that effect that they could
16 enforce or could implement a statute that imposes upon one
17 county the obligation to exempt one event.

18 MR. KOLVET: It wasn't -- as I understand it, I
19 wasn't involved in the process because that was handled by
20 Mr. Shirley --

21 THE COURT: Then why did you just stand here a
22 moment ago and represent to me that the state legislature
23 intended to force Pershing County to allow this event?

24 MR. KOLVET: It was, as I understood it, to be a
25 statute which prohibited any county, not just Pershing County,

1 from invoking the Festival Ordinance against any event that
2 had been licensed by, like, the federal government through the
3 BLM and that type of thing that. That was changed --

4 THE COURT: Why does the statute use the word
5 "may" then?

6 MR. KOLVET: That was changed, your Honor, to
7 subsequently allow for the counties to use their discretion to
8 exempt it under certain circumstances --

9 THE COURT: Even if you read it as a "shall," or
10 threat of a "shall," which it doesn't read that way --

11 MR. KOLVET: I don't disagree with you.

12 THE COURT: -- it was adopted as a "may," even
13 if you read it as a "shall," the other provisions of the new
14 statute are not met in this case because the county did not
15 make the findings required by the new statute. But we'll get
16 to that in just a moment.

17 MR. KOLVET: Again, the basic understanding I
18 have of your objection is that the county somehow gave away
19 its right to enforce its laws prohibiting offenses against
20 children and all of those things. As I understand the
21 exemption, it doesn't do that.

22 And, secondly, this agreement does not contemplate
23 that a sheriff's deputy going out on the playa as part of a
24 routine patrol that sees any violation of state law cannot act
25 upon that violation, cannot arrest the perpetrator, or cannot

1 do any other thing to enforce the laws of the State of Nevada.

2 THE COURT: We'll get to that point in a few
3 minutes, sir.

4 MR. KOLVET: All right. But I just want you to
5 know my interpretation.

6 THE COURT: But it's clear to me that you don't
7 understand it, so I am going to ask that you get a copy of the
8 transcript, sir, and you read it over several times, because
9 it's obvious to me this is going right over your head.

10 MR. KOLVET: I disagree with that, your Honor.
11 I disagree with the fact --

12 THE COURT: Yes, you do.

13 MR. KOLVET: -- the fact that you said that I
14 didn't understand the first order.

15 What I'm saying to you is that we've reached an
16 agreement here that says we're going to -- they're going to
17 dismiss the lawsuit against us. We have other agreements in
18 place. But nothing says we give up our right to enforce state
19 law, and that's just my point.

20 MS. HURST: Your Honor, I'm concerned --

21 THE COURT: Well, you're wrong, and it's going
22 over your head, sir, and I'm going to ask you to read the
23 transcript to get a little better education.

24 MS. HURST: Your Honor, I'm concerned the Court
25 may be proceeding under a misapprehension because of a

1 clerical error in the initial filing related to the
2 stipulation.

3 In the initial filing related to the stipulation we
4 accidentally omitted the second exemption agreement --

5 THE COURT: I've got the second exemption
6 agreement.

7 MS. HURST: -- which wasn't -- which was entered
8 into by the county at an earlier time separate from the
9 settlement and for which the county held public hearings,
10 received evidence and entered a variety of findings --

11 THE COURT: The settlement specifically
12 incorporates that prior exemption.

13 MS. HURST: Yes.

14 THE COURT: And it asks me to approve it.

15 MS. HURST: Your Honor, we are not requesting
16 court approval for this settlement agreement. We are simply
17 making a motion to dismiss.

18 The motion to dismiss -- the only reason we made a
19 motion at all, instead of just filing a stipulation, is
20 because we wanted the Court to retain jurisdiction to enforce
21 the agreement.

22 THE COURT: As you're going to see at the end of
23 this monologue, that's the attempt, is that you're not going
24 to be able to dismiss except with prejudice, ma'am.

25 MS. HURST: We did dismiss with prejudice, your

1 Honor.

2 THE COURT: Yeah, and the Court will
3 specifically disapprove in that order, and will invalidate the
4 exemption, because it was given by way of fraud on the
5 commission and fraud on this Court.

6 So the order of dismissal will specifically, or
7 simply denial of dismissal will also declare invalid the
8 exemption proceedings and the signatures of the county
9 commissioners.

10 MS. HURST: Your Honor, I don't believe there's
11 anyone before this Court asking for that relief.

12 THE COURT: Right.

13 MS. HURST: I don't believe there's any evidence
14 in the record that would support that form of relief, and I
15 don't believe the Court has jurisdiction to enter that relief.

16 THE COURT: Good, ma'am. Have you entered your
17 objection, ma'am?

18 MS. HURST: I have, your Honor.

19 THE COURT: Good.

20 MS. HURST: I may make further objections as
21 well.

22 THE COURT: I'm sure you will. Now, please be
23 seated, and I'll continue.

24 The Court dismisses the fifth cause of action.
25 That's in my order.

1 "Although defendants make allegations that,
2 if true, could be serious judicial misconduct, those
3 issues are not properly before this Court." Number
4 one, "As to recusal under state statute, that belongs
5 in the state court. Plaintiff must petition the
6 state court and/or the Nevada Supreme Court."

7 As we also know, they have to move to intervene in
8 that proceeding to set it aside.

9 "Although plaintiff was not a party to the
10 proceedings, it could move to intervene and for
11 relief from judgment and/or recusal in the state
12 court, and then it could appeal any denial to the
13 Nevada Supreme Court via appeal or extraordinary
14 writ. The Court does not believe it has jurisdiction
15 to adjudicate the recusal issue under the federal Due
16 Process Clause. The U.S. Supreme Court has ruled
17 that the Due Process Clause can require recusal where
18 a state judge has received a campaign contribution
19 from one of the parties appearing before him of such
20 a magnitude that it could tempt the average judge to
21 rule in a biased manner."

22 And I cited for you for your instruction
23 *Caperton v. A.P. Massey Coal*. "That is not" -- that's a
24 U.S. Supreme Court case.

25 "That is not alleged here. But even assuming

1 the Due Process Clause similarly applies to require
2 recusal in a case like the present one, that is, ex
3 parte collaboration with one party and actual
4 personal bias, the U.S. District Court is simply not
5 the route for plaintiff - 'a state-court loser
6 complaining of injuries caused by a state-court
7 judgment rendered before the state court proceedings
8 commenced and inviting district court review and
9 rejection of that judgment' - to obtain federal
10 review."

11 There's just no jurisdiction to do that, citing
12 *Exxon Mobile*, a U.S. Supreme Court case.

13 "Plaintiff must challenge the state court
14 ruling through the state courts and to the
15 U.S. Supreme Court."

16 Through the Nevada Supreme Court, not through the
17 federal court, or the Ninth Circuit, but you have the right of
18 review even up to the U.S. Supreme Court.

19 "Whether or not the plaintiff was a party in
20 the state court, this Court has no jurisdiction to
21 void the state court ruling. The Court therefore
22 dismisses the fifth claim."

23 So in violation of *Rooker*, in violation of
24 jurisdiction, you asserted this claim, and I dismissed it, and
25 it's there in plain language.

1 Now, the contract clause and breach of contract,
2 because this is one area where I think I'm going to change the
3 prior order.

4 "In the sixth cause of action, plaintiff
5 alleges that defendants violated the contract clause
6 by repudiating the 2005 and 2011 agreements, and that
7 defendants have breached those contracts under state
8 law. The Court will not dismiss these claims."

9 I think I'm going to change my mind.

10 "'No state...shall pass...any law impairing
11 the Obligation of Contracts."

12 But if you have a contract that's illegal, invalid,
13 because it imposes -- it impairs or abrogates the duty of a
14 county to fulfill -- or county sheriff to fulfill state law,
15 or to enforce state, federal, and local law, that agreement is
16 invalid.

17 And there's nothing wrong with the county commission
18 saying we think that prior agreement is invalid on a number of
19 grounds, that being one, and another being that we aren't
20 being permitted to charge for the full, fair, reasonable value
21 of services that the BLM requires us to provide.

22 That, plus any number of other reasons, could be a
23 valid basis for saying that agreement is invalid. That
24 doesn't violate the Contracts Clause. They just can't pass an
25 ordinance that invalidates an existing contract that is valid.

1 "'It long has been established that the
2 Contract Clause limits the power of the states to
3 modify their own contracts, as well as to regulate
4 those between private parties. Yet the Contract
5 Clause does not prohibit the states from repealing or
6 amending statutes generally, or from enacting
7 legislation with retroactive effects.' The Contract
8 Clause is no barrier to otherwise legitimate
9 legislation concerning the public welfare."

10 Let me read that to you again.

11 "The Contract Clause is no barrier to
12 otherwise legitimate legislation concerning the
13 public welfare that incidentally abrogates private
14 contracts."

15 So if the county has a private contract with mob
16 boss Joe So-and-So that we won't enforce state law or our
17 county law against your conduct, and thereafter a new
18 commission says, you know what, that contract was invalid, we
19 were abrogating our duty, it's no violation for them to pass
20 an ordinance to that effect. It doesn't violate the Contracts
21 Clause. That's as simple as I could put it.

22 "So long as the 'legislation adjusting the
23 rights and responsibilities of contracting parties is
24 upon reasonable conditions and of a character
25 appropriate to the public purpose justifying its

1 adoption.'"

2 For example, I gave you one example, child abuse
3 laws, a pre-existing contract that abrogated the duty to
4 enforce child abuse, child trafficking laws. Another example
5 is the state statutes that mandate that you charge reasonable
6 fees for various types of services.

7 The state statutes governing police departments
8 require that if you contract, or are required to contract, for
9 the provision of special services, as this BLM permit required
10 you to do, you must charge reasonably for the services. On
11 the basis of a bribe, on the basis of threats, on the basis of
12 a lawsuit, you can't give away those services, and if you did
13 in a prior contract, that contract is illegal.

14 And if you have a new ordinance that says, sorry, we
15 are now going to charge reasonable costs to cover our costs,
16 both fixed costs or special particular costs that are
17 allocated specifically and directly to an event, then the
18 county has the right to pass an ordinance that changes the
19 agreement. It's not a violation of the Contracts Clause of
20 the U.S. Constitution.

21 "But when a state repudiates or impairs its
22 own contractual obligations, the inquiry is a little
23 different. In the latter case, a court first asks
24 whether the state's contract was valid in the first
25 instance."

1 Let me read that to you again. This is the analysis
2 that you go through.

3 "But when a state repudiates or impairs its
4 own contractual obligations, the inquiry is a little
5 different. In the latter case, a court first asks
6 whether the state's contract was valid in the first
7 instance, that is, whether the contract purported to
8 bargain away the ability of future legislatures to
9 exercise their police power. ('In short, the
10 Contract Clause does not require a state to adhere to
11 a contract that surrenders an essential attribute of
12 its sovereignty.')" Citing a Supreme Court case.

13 Got that?

14 I added, of course, that economic agreements do not
15 generally fall within the Reserved Powers Doctrine, but
16 agreements that dictate welfare, public welfare, do fall
17 within that latter analysis.

18 "The Court finds that plaintiff has made out
19 a *prima facie* case of a Contract Clause violation" --

20 Again, I'm not saying that they have a cause of
21 action, I'm just saying they've alleged it.

22 "-- as to repudiation of the 2005 and 2011
23 agreements insofar as that repudiation stripped
24 plaintiff of the economic benefit of its bargain" --

25 And remember, that's their burden of proof. To

1 simply say that under the new agreement you're going to charge
2 more does not meet their burden. They may have additional
3 costs in spite of old agreements because the economy is more
4 expensive now, and costs for police enforcement goes up.
5 Unfortunately, and I'm sad to say, it goes up extremely as a
6 result of federal court decisions that impose all the time on
7 police more stringent obligations in effecting arrests, in
8 charging crimes, in reasonable use of force. Those costs go
9 up all the time.

10 So there is no violation of the Contract Clause, nor
11 violation of -- nor stripping of the plaintiff of the economic
12 benefit of its bargain under the old contract by saying, hey,
13 the state statute requires us to charge reasonably for the
14 costs that we're required to provide. That's not a violation
15 of the Contracts Clause.

16 "However, the Contract Clause and breach of
17 contract claims are not viable as against the
18 Festival Ordinance as a general matter. The Festival
19 Ordinance is based upon the legitimate police power
20 of the county, and the 2005 and 2011 agreements
21 Forbearance Clauses cannot strip the county of that
22 power.

23 "In summary, the repudiation of the
24 Forbearance Clauses is not a Contract Clause
25 violation, but plaintiff has sufficiently alleged

1 that repudiation violates the Contract Clause insofar
2 as it affected plaintiff's economic obligations."

3 The cost of law enforcement services. That's why I
4 had to remind you that's not in violation of state statutes or
5 the obligation to charge reasonably which we'll address in a
6 moment when we turn to the settlement agreement. There were
7 some others, but I think that's the main thing.

8 Let's address both the exemption agreement that
9 plaintiff says was passed independently, free of their fraud,
10 by the county commission, and then -- and without the
11 influence of the federal court's prior order, and let's turn
12 instead to the settlement agreement and the exemption
13 agreement so that you can see what my objection is.

14 Amended stipulation for dismissal with prejudice,
15 asking the Court --

16 "Whereas the parties to the instant
17 litigation have entered into a comprehensive Festival
18 Ordinance waiver, law enforcement and settlement
19 agreement, and an agreement to exempt, copies of
20 which are attached, whereas the settlement agreement
21 also provides a comprehensive long-term framework for
22 Pershing County to supply law enforcement services at
23 the annual Burning Man event in Black Rock
24 Conservation Area, and whereas the settlement
25 agreement further provides as a material term that

1 the Court shall retain jurisdiction to enforce the
2 settlement agreement, it is hereby stipulated and
3 agreed and requested jointly that the Court shall
4 enter the proposed order of dismissal with prejudice
5 retaining jurisdiction over the settlement agreement
6 filed contemporaneously herewith."

7 Now, quite honestly, ma'am, and I'm sorry to have to
8 say it, but in a mealy-mouthed fashion you told me that you
9 weren't asking for the Court to approve the settlement
10 agreement.

11 MS. HURST: We're not asking for the Court to --

12 THE COURT: Thank you.

13 MS. HURST: -- approve the settlement agreement.

14 THE COURT: You seconded and you repeated again
15 your mealy-mouthed comment, and this is why it is that.

16 You're asking me to retain jurisdiction over
17 enforcement of it. Implicitly I'm approving it. Do you
18 understand that?

19 MS. HURST: Your Honor, this is not a class
20 action settlement or any other type of suit requiring --

21 THE COURT: What does that have to do with my
22 comment?

23 MS. HURST: I believe I was being responsive.
24 If the Court thinks otherwise, I apologize.

25 THE COURT: Were you are under the misimpression

1 that I thought this was a class action case?

2 MS. HURST: No, your Honor. This is not the
3 kind of case that requires court approval over the settlement.
4 If the Court wishes not to retain jurisdiction, then it may
5 deny that aspect of the motion, obviously.

6 THE COURT: You don't think that any subsequent
7 court challenging my retained jurisdiction and ruling that
8 they must comply would rule anything but that I had implicitly
9 approved it?

10 MS. HURST: No, I do not, your Honor, because --

11 THE COURT: You don't think they would.

12 MS. HURST: No. Whatever arguments the parties
13 may have --

14 THE COURT: I'm going to suggest, ma'am, that
15 you go back to law school.

16 MS. HURST: Whatever argument the parties --

17 THE COURT: Thank you. You've made your
18 objection, sit down.

19 MS. HURST: Whatever argument --

20 THE COURT: Sit down.

21 MS. HURST: -- the parties may have --

22 THE COURT: Call the court security officer,
23 please.

24 MS. HURST: Your Honor, may I preserve Black
25 Rock City's position for purposes of the record?

1 THE COURT: You already did, ma'am. Sit down.

2 MS. HURST: Your Honor, I was in the middle of a
3 sentence.

4 THE COURT: Last time. Sit down.

5 All right. Let's review that agreement.

6 The comprehensive Festival Ordinance waiver, law
7 enforcement and settlement agreement between Black Rock. It
8 has various recitations, A, B, C, D.

9 "Beginning in late 2011, the Pershing County
10 Commissioners, District Attorney, and other public
11 officials within Pershing County, including District
12 Judge Richard Wagner, made a variety of public
13 statements indicating that they believed minors
14 should not be present at the Burning Man event.
15 Judge Wagner also made statements that the 2005 and
16 2011 settlement agreements were invalid."

17 In the next page of recitals, in number I,

18 "On May 15th, 2012, the District Attorney
19 filed a petition for writ of *certiorari*, mandamus
20 and/or prohibition in state court seeking to
21 invalidate the 2005 and 2011 settlement agreements
22 based on a claim that the settlement agreements
23 violated state law. The petition named the county
24 commissioners as defendants. BRC was not named as a
25 party, and BRC was not served with the state

1 petition. The county commissioners, after consulting
2 with independent counsel, declined to contest the
3 requested writ, and a judgment was entered by Judge
4 Richard Wagner who, during county commission
5 meetings, had previously made public statements about
6 the presence of minors at the event and the
7 invalidity of the settlement agreements purporting to
8 invalidate the 2005 and 2011 agreements."

9 And you already know what I think about that
10 paragraph in the order that dismissed your cause of action
11 based upon that.

12 "On May 27, 2013, the Nevada legislature
13 passed, and on June 1st, 2013, the governor signed,
14 Nevada bill 374. AB374 provides that notwithstanding
15 the provisions of 244.354 to 3548 inclusive, which,
16 of course, mandates every county in the state to pass
17 such an ordinance, a board of county commissioners
18 may in its discretion agree to exempt any assembly
19 from regulation under the provisions of NRS where
20 such assembly occurs on public lands and the assembly
21 organizer obtains a permit from a federal agency to
22 hold the assembly. And AB3" -- which this permit, of
23 course, did not.

24 "AB374 also provides for the validity and
25 enforcement of such an exemption of a law enforcement

1 agreement beyond the terms of any board of county
2 commissioners enacting such exemption and/or entering
3 into such an agreement."

4 We'll get to that in just a moment, and this is one
5 of the major areas where you misinterpreted the legislation,
6 sir. You entered into an agreement here that bound the county
7 to a 50-year exemption, 50 years, the county did.

8 MR. KOLVET: The county did.

9 THE COURT: And I assume upon your advice.

10 MR. KOLVET: No, sir.

11 THE COURT: No, sir. Okay. Well, that's good.
12 That speaks to your credit.

13 Fifty years. Somebody provided an interpretation to
14 the county of the new state legislation that the county could
15 exempt an event or group beyond a reasonable period. The
16 words "reasonable period" are not used in the statute, but I
17 have no doubt that any state court, certainly this Court,
18 would impose such a limitation.

19 MR. KOLVET: Your Honor, just --

20 THE COURT: For anybody to have interpreted this
21 state statute to mean that a county could, by agreement,
22 exempt into the future, indefinite future, we know that would
23 of course be invalid probably under the rule against
24 perpetuities, but certainly for a 50-year term to provide a
25 specific amount for law enforcement services, and to exempt

1 the permittee from complying with the county ordinance
2 expressing concerns for sewage, child welfare, legal -- or
3 criminal violations, was clearly a misinterpretation, and I
4 don't think any court, any judge in their right mind would
5 confirm such an interpretation, and I cited to you those two.

6 Now, let me tell you the ones that are simply
7 objectionable, make the agreement invalid, and will be grounds
8 for my striking the agreement and the signatures of the county
9 commissioners.

10 "1.1. AAR, After Action Report shall mean
11 and refer to a report made in writing by the sheriff
12 to BRC providing all information in county possession
13 relating to warnings and citations issued to, and
14 arrests or detention of, attendants at Burning Man
15 event, and actual expenses in connection with the
16 event, except to the extent" -- I'm delighted that
17 you include this clause -- "the release of such
18 information is prohibited by federal or state law."

19 Now, there's nothing wrong with the requirement that
20 we'll read in a few minutes that there be an After Action
21 Report that justifies the costs being charged by the county
22 for providing law enforcement services or for coroner services
23 or anything else.

24 But what you cannot do in a legal, valid agreement
25 is bind the county to release information which the District

1 Attorney determines I can't release, you know, I'm not going
2 to release to Black Rock. Obviously Black Rock is in a
3 position not only to protect themselves, but to protect the
4 participants in the event, the people that they permit to come
5 in.

6 If someone came across the state line carrying five
7 tons of marijuana, and they're arrested and they're
8 prosecuted, don't you think that somewhere down the road Black
9 Rock will be complaining, and/or that defendant will be
10 complaining, if the District Attorney refused to disclose all
11 the witnesses, all the writing on the tickets, all of the
12 arrest reports prior to the time that they have to do so in
13 the prosecution, all of the -- what does it say? All
14 information in county possession, everything, minutes,
15 everything. That's an illegal provision.

16 It defines the BLM permit, of course.

17 "BLM means the Bureau of Land Management, and
18 BLM permit means any special recreation permit to BRC
19 for the purpose of holding a Burning Man event in the
20 Black Rock National Conservation Area."

21 You know, the real problem for this agreement, and
22 I'll just pause for a moment to tell you, is BLM should have
23 been doing this. You know, if Black Rock was so excited about
24 the county suppressing their free speech of running around
25 nude out on the desert which nobody really should care about

1 other than in the presence of children, they should have filed
2 a complaint with the federal court against the BLM, delete
3 that provision mandating that we contract for services, and
4 now, as we've seen as a result of this case, at ridiculously
5 low prices.

6 They should have asked for a mandate from this Court
7 ordering the BLM to perform that service, then let us all sit
8 back and watch the BLM exempt this applicant from federal,
9 state, and local ordinances. That would be a real joke, and
10 we know that they wouldn't do that, of course.

11 Next provision that's objectionable, 1.9, integrated
12 command. How can you -- when the BLM permit requires law
13 enforcement by the sheriff's office and contracted-for
14 services and direct payment, how can you impose in this
15 agreement an integrated command system? You can't do it.
16 Integrated -- the BLM permit doesn't contemplate it.

17 "Integrated Command means a system of law
18 enforcement at the event which provides for the
19 command, control, and coordination of emergency
20 responses to incidents that occur at the event.
21 Under the Integrated Command structure," capital I,
22 capital C, "the BLM and sheriff's office provide a
23 coordinated response to situations at the event" --

24 So are you implying that BLM, or Black Rock through
25 BLM, has the right to negate the sheriff's actions? We're

1 sorry, you won't be able to arrest anybody for either juvenile
2 delinquency or delinquency motivation of a minor because they
3 brought in a minor and allowed them to walk in the areas where
4 there was public nudity display.

5 You're calling for an integrated command. The BLM
6 doesn't call for it, doesn't allow it. Each agency is
7 responsible.

8 "Under the integrated command structure, BLM
9 and sheriff's office provide a coordinated
10 response" --

11 What does coordinated mean? It means they both have
12 to agree, right?

13 "-- to situations at the event. Each agency
14 is responsible for the enforcement of specific laws
15 pertaining to their specific jurisdictional
16 oversight." BLM, federal and Pershing County.

17 "The integrated command occurs during the
18 set period of time coinciding with the event in the
19 geographical area of the event. The number of
20 officers needed for policing the event and therefore
21 the limitation on what you can charge for such
22 services, and the limitation on how many events --
23 significant criminal events you can cover," quote,
24 "is determined through a cooperative effort between
25 the BLM and the sheriff's office with," beautiful

1 words, "input from BRC."

2 That's illegal; invalid.

3 Now, we're at noon. I'm going to keep going. I'm
4 going to hold you here for -- we've got about 15 more minutes
5 to go, and I can tell that you're all disgusted with the
6 Court, but I'm going to remind you, you're looking at a
7 federal United States District Court judge, and the bottom
8 line of this whole event is going to be a referral of all of
9 the counsel to your respective state bars.

10 You've not only misrepresented to your clients,
11 misinterpreted the Court's orders, you've committed
12 malpractice in this case, and you -- in the pretext of a
13 federal court proceeding, you've come up with a pretextural
14 settlement agreement.

15 You're doing the very same thing that you accused
16 the county of doing in a pretextural lawsuit in which BRC was
17 not involved. You've done and attempted to do the same thing
18 on this Court. It was a fraud on me. The Court resents it,
19 and one conclusion here will be a referral to your respective
20 state bars.

21 Another invalid provision. Exemption from Pershing
22 County Code, Chapter 5.16, 2.1.

23 "That certain agreement to exempt Black Rock
24 City from other provisions of Pershing County, a copy
25 of which is attached hereto as Exhibit A, is hereby

1 incorporated by reference as more fully restated
2 herein."

3 In other words, that exemption action is fully
4 stated in the settlement agreement for which the Court retains
5 continuing jurisdiction to enforce it.

6 Number three, law enforcement services.

7 "The county will provide for the enforcement
8 of state and local laws at the event pursuant to the
9 BLM permit as part of an integrated command with BLM
10 law enforcement personnel, or, if both BRC and the
11 county agree, as a separate command."

12 So BRC has to approve this arrangement, integrated
13 command versus separate command.

14 "If BLM refuses expressly and in writing to
15 conduct an integrated command with the county" --

16 In other words, the BLM got out of it, right? By
17 the permit, they said go to the county for this service, but
18 if BLM should nevertheless refuse, expressly and in writing,
19 to conduct an integrated command, then BRC will not withhold
20 its consent to a separate command.

21 So, in other words, unless they get it in writing
22 from BLM, there's going to be an integrated command on which
23 coordinated effort requires, of course, joint consent of both
24 the BLM and the sheriff's office with, I remind you, quote,
25 unquote, "with input from BRC," whatever that means.

1 And if they should ask a Court to say, listen, we
2 gave our input and they didn't consider it, they went against
3 us, that they wanted a separate command, and they wanted to
4 enforce the laws on child endangerment, arguably they've got
5 an argument that you're violating the agreement.

6 The next provision that's invalid, 3.2. "At least
7 30 days prior to the event" -- this general provision actually
8 is valid.

9 "At least 30 days prior to the event, the
10 sheriff will meet with BRC to disclose and discuss
11 law enforcement priorities for that event for that
12 year." Good resolution.

13 "The purpose of the meeting will be to
14 enhance event coordination between law enforcement
15 and BRC to enable BRC to provide targeted information
16 to participants to enhance compliance in cooperation
17 with patrolling officers."

18 Very good provision. I compliment whoever drafted
19 this one.

20 "If law enforcement priorities for the event
21 change following the meeting, the sheriff will
22 immediately notify BRC of the nature of the change in
23 priorities and will arrange for a follow-up meeting
24 with BRC as soon as reasonably possible to discuss
25 the details."

1 The next provision, 3.3, is both valid and invalid
2 in parts.

3 "Within three days of the event, the sheriff
4 and BRC will meet to prepare a joint press release
5 about the law enforcement activities at that year's
6 event. The press release" -- this is three days
7 before the event. "The press release will reflect a
8 consensus view of the parties."

9 So, in other words, both sides, BRC and the
10 sheriff's office, will be required to consent to this
11 publication of the priorities to be exercised by the sheriff's
12 office in enforcement of its duties.

13 So presumably, under this provision, if BRC says
14 we're not going to include in this warning, in this category,
15 that you are barred from permitting children to view lewd,
16 lascivious conduct, you'll be in violation of it.

17 Nothing wrong with the clause generally, three days
18 before, good, but you give basically a veto power, at least on
19 the press release for the priorities, about what duties the
20 sheriff will carry out and what priorities.

21 The next objectionable one is in 3.5.

22 "The sheriff shall, within 14 days after the
23 event, provide an After Action Report. If the
24 information for the After Action Report is not yet
25 available at that time, then the sheriff shall

1 provide the information as soon as it becomes
2 possible."

3 Actually, that provision is probably good and very
4 good, at least to the extent that it is getting into the costs
5 that the sheriff's office has had to expend which BRC has
6 every right in the world to review.

7 My main objection to the prior ones -- I'm going to
8 cite later ones in just a moment. The main objection to the
9 prior ones is you misinterpreted the new state statute that
10 allows you to exempt. It uses the word may, of course, and it
11 uses the word may only if it's on federal lands which
12 otherwise have jurisdiction to regulate them, and only if the
13 federal agency satisfies the concerns for regulation expressed
14 in the state-mandated local ordinance which we'll address in
15 just a moment.

16 Somebody told this county commission that they could
17 adopt an agreement that exempted -- that provided for a change
18 not required in the BLM's certificate or permit for a
19 coordinated -- what's the language -- integrated command, not
20 under the sole jurisdiction of the sheriff's office, but under
21 BLM and sheriff's office with input from BRC. Whoever
22 interpreted the new state statute to say this was permitted to
23 a county obviously didn't know how to read statutes.

24 Now, the big problem with this agreement is the
25 agreement as to reimbursement for costs and the term. I can't

1 find much wrong with the initial block of agreed payments.
2 That's the whole idea of an exemption and an agreement. You,
3 county, agree to render special services and you agree that
4 you will charge this amount. Nothing wrong with that. That's
5 what the new statute contemplates.

6 Of course, to the extent that we have the block for
7 base payment, separate command, one to 60,000, 375,000; 60,000
8 to 70,000, 400,000 fee; 70,000 to 80,000, four twenty-five
9 fee; 80 to 90,000, \$500,000 fee; 90,000 to a hundred thousand,
10 \$600,000 fee. Nothing wrong with that.

11 I assume you negotiated between yourselves, and you
12 had some revelation about basically the type of liquidation
13 clause analysis that goes on, here will be our probable costs
14 depending on the peak population.

15 It is objectionable that you included a similar
16 block in the case of an integrated command, which is an
17 illegal requirement in this agreement, with lower
18 compensation. That's objectionable.

19 "4.3. The base payment shall be determined
20 by taking the base payment associated with the
21 applicable range of peak population and command
22 status, integrated or separate."

23 And then adjusting for inflation using the Consumer
24 Price Index, assuming that 2014 is the base year, and that's
25 the inflation adjusted payment. Nothing wrong with that if

1 the agreement is for a term of five years, maybe even ten
2 years. This agreement is binding for 50 years.

3 Who advised the county that the state statute
4 authorized them, in violation of state law prohibiting them
5 from giving away county services, in violation of this statute
6 itself, in violation of all other kinds of statutes that
7 impose duties upon the office and chair, which attorney
8 advised the county that it was appropriate under their
9 interpretation of this new statute that the county bind
10 themselves for 50 years to a cost of living index?

11 MR. KOLVET: Your Honor, this agreement is for
12 ten years. The exemption agreement is for 50.

13 THE COURT: Fifty years.

14 MR. KOLVET: And I did not advise them on the
15 50. I did advise them on this agreement, which is the 10 --

16 THE COURT: And where is the ten years, by the
17 way?

18 MR. KOLVET: I'm looking, your Honor.

19 THE COURT: That's the same thing I did last
20 night for about 45 minutes. Of course, I'm capable of missing
21 stuff, too.

22 And remember, please, that the exemption agreement
23 which has, in effect, a term of 50 years, until 2063, is
24 incorporated by reference into this agreement.

25 MR. KOLVET: Yes, your Honor. There are terms

1 of that exemption agreement apparently that are -- and they
2 are different than what's in the settlement agreement.

3 THE COURT: They are in conflict.

4 MR. KOLVET: I'm not exactly sure what reference
5 that is --

6 THE COURT: So what do you think, sir, as a law
7 school graduate, the effect of incorporating one agreement
8 into another is?

9 MR. KOLVET: There are terms of that agreement
10 that affect other than law enforcement. This is basically the
11 law enforcement portion of that agreement. There is coroner's
12 fees agreement, and there is other things in that agreement
13 which were not part of this agreement.

14 THE COURT: But that agreement was specifically
15 that agreement, unlike -- this agreement did allow other
16 separate agreements. For example, if you're going to provide
17 sewer service or whatever else, this agreement says you can
18 enter into separate agreements, but unlike those such future
19 separate agreements, this settlement agreement incorporated
20 the exemption with respect to the provision of police
21 services.

22 So do you want to keep looking or --

23 MR. KOLVET: No, your Honor. I haven't found
24 the term, but it was intended for this one to be only ten
25 years.

1 MS. HURST: There's a reference to the ten-year
2 term in paragraph 6.1, your Honor, all parties agree that it
3 is a ten-year term.

4 THE COURT: 6.1. Good.

5 MS. HURST: All parties agree that it is a
6 ten-year for law enforcement services.

7 THE COURT: Well, with all due respect, ma'am,
8 I'm going to read it, please.

9 "Agreement shall be governed and interpreted
10 under the laws of the United States, State of Nevada,
11 without recourse to conflicts of laws and principles.
12 The exclusive venue for any disputes between the
13 parties arising under or connected to this agreement,
14 except for the matters specified in Exhibit A, shall
15 be the United States District Court for the District
16 of Nevada. The parties further agree that the United
17 States District Court has continuing and exclusive
18 jurisdiction over all terms of this agreement for the
19 ten-year term of the law enforcement services agreed
20 to be supplied herein."

21 So the continuing jurisdiction is limited to ten
22 years. Where is the provision referenced here?

23 "Over all the terms of this agreement for
24 the," the, not a, "for the ten-year term of law
25 enforcement services agreed to be supplied herein."

1 MS. HURST: That's one of the objects of the
2 agreement. It's the entire section entitled Law Enforcement
3 Services, your Honor.

4 THE COURT: Where's that? That's the one that's
5 incorporated by reference?

6 MS. HURST: No, your Honor. It's -- the law
7 enforcement services are not part of the exemption agreement,
8 the originally-granted exemption agreement. They're only part
9 of the settlement agreement, and they last for ten years under
10 the settlement agreement, and then at that time the parties --

11 THE COURT: Where does it say ten years?

12 MS. HURST: In the sentence that the Court just
13 read, your Honor.

14 THE COURT: Ma'am, with all due respect, it
15 doesn't say that. It says the continuing jurisdiction of the
16 Court over the agreement is limited to a ten-year period, but
17 it makes reference to "the ten-year term of the law
18 enforcement services agreed to be supplied herein."

19 Is there anywhere in this agreement that says the
20 law enforcement services is limited to a ten-year term,
21 anything other than the 2063 termination date in the other
22 agreement incorporated by reference?

23 Let's turn to that for just a minute. We need to
24 get back to this one.

25 Here's the agreement to exempt Black Rock from other

1 provisions of Pershing County Code 5.16.

2 "Whereas the Nevada legislature has
3 recognized that notwithstanding these provisions a
4 Board of County Commissioners may, at its discretion,
5 agree to exempt any assembly from the regulation
6 under the provisions" --

7 We'll need to read the statute which we're going to
8 in just a moment to see how you misinterpreted it.

9 "-- if the assembly occurs on public lands,
10 and the assembly organizer obtains an annual permit
11 from a federal agency to hold the assembly."

12 Funny how the whereas didn't contain the rest of the
13 clause, including the mandatory that if we were talking about
14 a federal agency, this is talking about a federal agency that
15 regulates, governs, has jurisdiction for, and enforces the
16 laws on public land.

17 You're not authorized to regulate special events on
18 tribal lands. You're not authorized to regulate special
19 events on federal lands. You don't have jurisdiction unless
20 the BLM, by agreement, agrees with you, in which case they
21 have in every county. In this state highway patrolmen are
22 authorized to come onto federal lands, general BLM lands, not
23 Forest Service lands or Park Service lands or an air base, to
24 enforce state laws.

25 "Whereas the Board of Pershing County

1 Commissioners held a public hearing, whereas the
2 agreement shall cover the assembly known as the
3 Burning Man event which is hosted by Black Rock each
4 year in the Black Rock Conservation Area in Pershing
5 County which is public land managed by the Bureau of
6 Land Management, therefore the parties agree the
7 Burning Man event, which is organized, promoted and
8 managed by Black Rock, is an assembly which is held
9 on public lands, specifically the Black Rock
10 Conservation Area, which is managed by the Bureau of
11 Land Management."

12 It's too bad that's a very incomplete sentence.
13 It's not fully managed by the Bureau of Land Management with
14 regard to law enforcement or other services during this event.

15 "This agreement is subject to the Burning Man
16 event being held in the Black Rock Conservation Area
17 during an 8- to 14-day period,"
18 that's specified, excluding periods when the Burning Man event
19 is not held, and for four years without fault, and here's the
20 interesting provision,

21 "Unless extended in writing by the parties,
22 this agreement shall terminate on the first day of
23 October, 2063," 50 years hence.

24 "The Burning Man event, while this agreement
25 remains in effect, shall not be subject to the

1 requirements of Pershing County Code 516.010."

2 Who in the world, what attorney stood before the
3 county commission and said this new statute gives you the
4 right to exempt an event and provide for services, lock
5 yourself into services, for 50 years, and, by the way, to bind
6 subsequent county commissions for 50 years? Clearly the
7 intent of the legislature was to bind subsequent county
8 commissions even if there's an intervening election so that
9 the economics can be realized of the transaction.

10 I don't think anybody could prove that the state
11 legislature, nor will you find me any report that says the
12 state legislature, intended to let you bind the county for
13 50 years into the future.

14 Question mark, number seven. Insurance.

15 "If the Bureau of Land Management does not
16 require insurance as part of its permitting process,
17 the following conditions apply."

18 That would be fine if it didn't have that
19 perforatory clause, "if the Bureau of Land Management does not
20 require insurance." It would be good except for the amounts.

21 "The following conditions apply. Black Rock
22 shall obtain and maintain assembly sufficient
23 commercial general liability insurance to cover
24 damages resulting from bodily injury, wrongful death,
25 property damage, constitutional, or other claims,

1 based upon, or relating to, the exemption granted by
2 Pershing County,"
3 which discharges the assembly from the obligations imposed
4 under various sections, the sections of the new statute.

5 So, of course, one of the constitutional claims we
6 are bound to expect is unreasonable use of force, or an
7 unlawful, illegal arrest. That's what I do with 80 percent of
8 my day is work on such cases, 1983 cases. So I would think
9 that we would expect that there will be 1983 claims against
10 the police department.

11 "Black Rock shall obtain and maintain
12 sufficient commercial general liability. The
13 organizer shall name Pershing County, its officers
14 and employees, as an additional insured." Very
15 appropriate.

16 "The amount of the insurance shall be
17 sufficient to cover the size and scope of the
18 assembly, but shall not be less than one million
19 dollars for each occurrence and one million dollars
20 for each personal injury."

21 Now, I must admit I've had a few 1983 actions as the
22 result of jury trial that resulted in less than a million
23 dollars during the course of the last couple of years, but
24 I've had a number of them exceeded it. Who in the world came
25 up with this one million dollar limitation? That seems to me

1 to be totally inadequate.

2 And also inadequate and illegal is, "If the Bureau
3 of Land Management does not require insurance as part of its
4 permitting process." So if it does, of course, if Bureau of
5 Land Management -- you can bet they are going to require an
6 insured provision naming the BLM. Do you think for a moment
7 the BLM will require an additional insured provision insuring
8 Pershing County? Who advised the commission to adopt that
9 one?

10 "In the event that the BLM permit requires
11 Black Rock City to obtain and maintain insurance that
12 the Pershing County shall be named as an additional
13 insured on the insurance policy required by BLM and
14 BRC shall comply with Section 7(E) above."

15 And so if the BLM says, yeah, a million bucks is
16 okay, or 500,000 is okay, and now you have 1983 actions that
17 resulted -- what was the judgment to the gentleman that we
18 heard last year, unreasonable use of force, ended up with
19 permanent back injury? Three million? By the time we added
20 interest, it was five million, and we still had attorneys
21 fees, another million, six million bucks.

22 Who advised the county to allow this provision to
23 exist?

24 "If Black Rock is aggrieved by the decision of the
25 Board of Pershing County" -- let's see. This has to do with

1 disputes under the payment of the bill.

2 "If Black Rock disputes the bill," which suggests
3 very strongly, as evidenced elsewhere, that there are grounds
4 for disputing the bill, namely, for example, that your payment
5 to the sheriff for his time out here cannot include an
6 appropriate hourly allocation for his payment. That's just an
7 example. Then, of course, it provides that they'll dispute
8 the bill in front of the county commission, there's time
9 periods.

10 "If Black Rock is aggrieved by the decision
11 of the Board of County Commissioners, Black Rock City
12 shall file a petition for judicial review in the
13 district court."

14 What district court is that, the federal district
15 court or the state district court which normally would have
16 the ability to review? Can anybody tell me the interpretation
17 of that?

18 MR. KOLVET: I wasn't involved in the
19 negotiations, so I would assume that it would be the state
20 district court in that case.

21 THE COURT: I would hope so, but it's not very
22 clear.

23 "Paragraph 12. The parties may enter into
24 separate contracts that will provide for payment of
25 anticipated impacts that the county will experience

1 as a result of the Burning Man event."

2 I should hope so.

3 "The parties may enter into separate
4 contracts that will provide for payment for
5 anticipated impacts."

6 And so what if they say your potential charge for a
7 hundred grand to run a sewer line out there isn't reasonable,
8 so you can't, nor are we obligated to, enter into a contract
9 with you for that service.

10 "Paragraph 16. Unless otherwise provided
11 herein, this agreement may be rescinded or amended
12 only by mutual written agreement of the parties to
13 this agreement. For the duration of this agreement,"
14 aside, 50 years, "no future Pershing County Board of
15 Commissioners may adopt an ordinance requiring, or in
16 any other way require, A, the application of the
17 provisions of that special permit ordinance to the
18 Burning Man event, Black Rock City, or any other
19 person or organization who permits, maintains,
20 promotes, conducts, advertises, operates, undertakes,
21 organizes, manages, or sells or gives away tickets to
22 the Burning Man event, or, B, any changes to the
23 terms of this agreement."

24 Fifty years. I wonder what attorney advised the
25 county commission that the new state statute authorized them

1 to bind future county commissions, bind future sheriff's
2 offices, for 50 years.

3 Let's finish up now by concluding the objectionable
4 clauses in the settlement agreement.

5 Paragraph 5.3,

6 "In consideration of the payment and other
7 promises contained herein, BRC fully releases and
8 discharges the county, its present and former
9 officers, employees and agents, from any and all
10 claims, demands and causes of action against any of
11 them arising out of, or related to, the federal case.
12 This release does not extend to Judge Richard Wagner,
13 and shall not be construed to bar any ethics or
14 disciplinary complaints," that's appropriate, "or
15 other proceedings," including lawsuits, of course,
16 "that BRC may choose to pursue against Wagner."

17 If I were a lawyer on their side, I'd be asking my
18 law clerk to prepare a memo. Isn't that a waiver of the
19 statute of limitations by the county? That's absurd.

20 Governing law and venue, 6.1,

21 "This agreement shall be governed and
22 interpreted under the law as the exclusive venue
23 for" -- well, I already covered this one.

24 "The jurisdiction over all terms of this
25 agreement for the ten-year term of the law

1 enforcement services agreed to be supplied here" --
2 and, of course, there's nowhere in here where we saw a
3 ten-year term. The only thing we saw is a block based upon
4 cost of living and presumably with the incorporation of the
5 other exemption agreement for a 50-year term.

6 "In the event that any action concerning this
7 agreement lacks subject matter jurisdiction in such
8 court, it must proceed in the Nevada state courts.
9 The parties agree that Judge Richard Wagner" --

10 And I add parenthetically, a validly -- is
11 he still a judge?

12 MR. KOLVET: Yes, your Honor.

13 THE COURT: Okay. And he hasn't had a petition
14 filed against him to remove him, or to remove him from this
15 case.

16 MR. KOLVET: There has never been any of that,
17 your Honor.

18 THE COURT: Not that you're aware of, okay. So
19 a validly-elected judge.

20 In the event that any action concerning this
21 agreement lacks such jurisdiction in my court and must proceed
22 in Nevada state courts, the parties agree that Judge Richard
23 Wagner shall be preempted therefrom.

24 Does the county commission have any, any -- under
25 state law any right to agree that a particular judge elected

1 under state law will be preempted from one of its actions,
2 especially an action he already sat on?

3 MR. KOLVET: Not on that action, your Honor.

4 THE COURT: Yeah.

5 MR. KOLVET: But on future ones, they can agree
6 not to use him.

7 THE COURT: No, they can't. They have the right
8 under state statute, whatever right they have, to file a
9 preemption certificate, that's true.

10 MR. KOLVET: That is correct.

11 THE COURT: I grant you that.

12 You don't have the right to preempt him generally.

13 So let's say, for example, that they had exercised
14 preemption on another judge that was selected already. Now
15 the wheel rolls and it's Judge Wagner. This agreement doesn't
16 say anything about exercising the preemption right under state
17 law or county rule. It says the parties agree that Judge
18 Wagner will be preempted therefrom.

19 MR. KOLVET: I agree that's what the language
20 said. The intent behind the language was to invoke state law
21 and preemption issues.

22 THE COURT: I fully accept that you had a
23 wonderful intent, a fuzzy, wonderful, feel-good intent.

24 "In addition, the undersigned persons agree
25 in their official and individual capacities that they

1 shall not file or prosecute any lawsuit, petition or
2 other proceeding, arising under or connected to this
3 agreement, including Exhibit A, before Judge Wagner."

4 It's not going to be in any settlement agreement, I
5 can tell you that.

6 "Enforcement. The parties agree that any
7 action to enforce this agreement is properly the
8 subject of a claim for specific performance and/or
9 injunctive relief." That's what this original action
10 is all about. "In any action to enforce this
11 agreement, including without limitation an action
12 regarding any termination of this agreement, the
13 prevailing party shall recover its reasonable
14 attorneys fees and costs including any fees of expert
15 witnesses."

16 So if the prevailing party -- and we know how the
17 Ninth Circuit interprets prevailing party now-days. In 1983,
18 1988 authorized attorney fee transfer provisions, if you get
19 one little thing, you get prevailing party fees, don't you?

20 In a 1988 action, or a further 1983 action based
21 upon violation of the First Amendment or enforcement of this
22 one, the Ninth Circuit says if you get one little thing like
23 an injunction, hey, county, you've violated that one
24 provision, you get prevailing attorneys fees.

25 That's fine. That's a subject matter of appropriate

1 agreement. But also fees of expert witnesses. So now, if
2 they want to put on a witness who they insist should get on
3 the stand and tell me what's a violation of the First
4 Amendment or not, is the county committing to pay for that
5 witness even though it's not permissible or allowable under
6 the costs that I would normally give? Nor would they even be
7 allowed to testify.

8 Okay. Those are the problems with what I found in
9 the agreement. Now, obviously you don't like what I've been
10 saying, and, of course, I will file a complaint against all of
11 you. You certainly are entitled to file a complaint against
12 me, not based on the merits, of course, or the decisions that
13 I'm rendering, that's a matter for appeal.

14 But the bottom line is I'm going to change my order
15 of dismissal getting rid of practically all, if not all, of
16 the face challenges on First Amendment grounds.

17 I will also review and rule on the one motion for
18 summary judgment that I do have in the record to see if these
19 claims survive that motion, and I will -- if I have to
20 preserve for trial an as-applied challenge because there are
21 material questions of fact. You already have a scheduled
22 trial date.

23 Madam Clerk, when is that trial date?

24 THE CLERK: Just a moment, Judge.

25 THE COURT: While she's getting that, it's

1 already set, I think in February.

2 THE CLERK: The calendar --

3 THE COURT: Unless you tell me otherwise, I
4 don't know that we're going to be having a --

5 THE CLERK: February 3rd, 2014, is the calendar
6 call, and jury is February 11th, 2014.

7 THE COURT: Very good. I'm planning on that.
8 I'm not planning on a jury trial. I think the primary relief
9 requested here, or the only relief that will be allowed will
10 be injunctive relief which is a trial to the Court, so I'm
11 going to be the fact finder.

12 The only one that would be -- if there was a claim
13 for violation or breach of contract, that would be a jury
14 question, of course, but I don't think that cause of action is
15 going to survive here, nor can you seek a damage amount
16 against the county or against the individual commissioners in
17 their official capacity, nor do I think that there will be an
18 ability to survive summary judgment on proof of any causal
19 nexus to any claimed damage because of the county's alleged
20 attempts to inhibit protected speech. Number one, I don't
21 think the county has been successful in doing that.

22 And I will make sure that the dismissal order
23 strikes the exemption agreement as based upon a
24 misinterpretation of the state statute and a fraud upon the
25 Court. That's what I'll do.

1 Now, I'll let you briefly, please, enter your
2 objections to preserve your appeal.

3 MS. HURST: Your Honor, the summary judgment
4 motion that was filed was withdrawn upon reaching the
5 settlement agreement which called for a stipulation of
6 dismissal. It was never formally withdrawn because we filed
7 the settlement agreement.

8 Black Rock City would like to stand on the
9 settlement agreement, and since the Court has denied --
10 obviously denied the motion to retain jurisdiction under
11 41(a)(2) --

12 THE COURT: That's not what I did, but that's
13 okay.

14 MS. HURST: -- the stipulation for dismissal
15 becomes -- under 41(a)(1)(A)(2) becomes effective, and the
16 Court is without jurisdiction to act any further in this
17 matter.

18 THE COURT: Further objections?

19 MS. HURST: Your Honor, I request that the Court
20 stay the remaining proceedings that it has indicated it will
21 enter into --

22 THE COURT: File a written motion, please.

23 MS. HURST: -- in order that we address this to
24 the Ninth Circuit. I also request that --

25 THE COURT: File a written motion, please.

1 MS. HURST: Thank you, your Honor.

2 I also request that if the Court is going to *sua*
3 *sponte* reconsider its orders and set down for hearing the
4 various other matters that it's described, that appropriate
5 briefing schedules be provided that will allow Black Rock City
6 to respond to them.

7 THE COURT: If you believe that any appropriate
8 briefing is required, or that a schedule would be appropriate,
9 I'll ask you please to suggest it after consultation with
10 counsel.

11 MS. HURST: Your Honor, may I have the Court's
12 oral ruling on the motion for stay pending taking this matter
13 to the Ninth Circuit?

14 THE COURT: No. I requested that you file a
15 motion, nor have I made an oral ruling here. I will make a
16 ruling in writing.

17 MS. HURST: Your Honor, I don't believe there is
18 time for us, given the holidays, to present that motion on the
19 normal schedule under the district before the Court would be
20 required to act on the pending summary judgment motion and the
21 trial date coming in early February.

22 THE COURT: You don't believe what?

23 MS. HURST: I don't believe, given the normal
24 notice motion schedule under the district's rule and the
25 upcoming holidays --

1 THE COURT: I'll shorten time.

2 MS. HURST: -- there would be time to do that.

3 THE COURT: You're wrong. I'll shorten time.

4 You can certainly file a motion for an emergency stay.

5 MS. HURST: Is the Court ruling on the motion to
6 dismiss?

7 THE COURT: Am I ruling right now?

8 MS. HURST: On the motion to dismiss that was
9 presented.

10 THE COURT: No. Whatever rulings you get will
11 be in a written order. I'm not going to play that game with
12 you.

13 MS. HURST: So the Court has made no rulings
14 today; is that correct?

15 THE COURT: That's correct. I've given my
16 reasons, you'll see them in the written order, and so that you
17 could hear my criticisms directly.

18 The bottom line is you folks ignored my prior order,
19 and you committed malpractice in misinterpreting the state
20 statute, and the primary complaint that I have is you
21 attempted to do it over my signature, which, of course, we
22 would hear in the next election campaign literature of the
23 county commissioner who signed it, I signed it because the
24 federal judge said I had to.

25 MS. HURST: Your Honor, the parties to this

1 matter have had disputes for a very long time.

2 THE COURT: Apparently.

3 MS. HURST: And it was quite difficult to
4 negotiate a final settlement which we were finally able to
5 reach, not because anybody was brandishing a federal court
6 order, but because the Nevada legislature acted, and because
7 all parties could see that it was in their mutual --

8 THE COURT: I appreciate your excuse, ma'am --

9 MS. HURST: -- best interest.

10 THE COURT: -- and I appreciate the sincerity of
11 your statement. But what makes you think you can waltz across
12 the state line and approach a federal court and ask it to bar
13 the county from enforcing normal laws and rights?

14 You read the agreements, the settlement agreements
15 that you reached. You read your own complaint. What makes
16 you think that on the basis of a First Amendment violation
17 complaint you can enter into an agreement with this county
18 that they will not enforce child abuse laws?

19 MS. HURST: There is no such provision in these
20 agreements, no such provision in any of these agreements, and,
21 to the contrary --

22 THE COURT: Yeah, explain that to the Ninth
23 Circuit, ma'am.

24 MS. HURST: To the contrary, your Honor, section
25 1.9 makes clear that the sheriff's office remains responsible

1 for the enforcement of state law. There is nothing in this
2 agreement that causes the sheriff or the county to abdicate
3 their law enforcement responsibility.

4 THE COURT: I hope you're not the attorney who
5 stands in front of me in the future asking me to enforce the
6 settlement agreement who will of necessity, of course,
7 complain that the county ignored their obligation to act under
8 an integrated command and with BRC's input.

9 Any other objections?

10 Court will be in recess.

11 (A recess was taken.)

12 THE COURT: We'll go back on the record in just
13 a moment.

14 I was looking for the provision that prohibited the
15 county, I think during the term of the agreement, I'm trying
16 to find it, from prohibiting the attendance of minors at the
17 event. It's a little unfair to ask you folks to help me find
18 it.

19 There we go, 5.1 of the settlement of litigation. I
20 just want the record to include that citation.

21 "County agrees that for the duration of this
22 agreement," which potentially is 50 years, if not
23 shorter, ten years, "it shall not attempt to
24 separately regulate any matters addressed by the BLM
25 permit, including without limitation the use of

1 alcohol and presence of children at the event."

2 That will complete the record. Thank you. Court
3 will be in recess.

4 -o0o-

5

6 I certify that the foregoing is a correct
7 transcript from the record of proceedings
in the above-entitled matter.

8 /s/Margaret E. Griener 12/26/2013
9 Margaret E. Griener, CCR #3, RDR
Official Reporter

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